

Kaur (Migration) [2018] AATA 1377 (13 April 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Mandeep Kaur
CASE NUMBER:	1607754
DIBP REFERENCE(S):	CLF2012/185572
MEMBER:	Amanda Mendes Da Costa
DATE:	13 April 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 13 April 2018 at 8:17am

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Genuine and continuing relationship – Marriage certificate – Limited pooling of financial resources – Child from a previous relationship – Sponsor’s absence from hearing

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2 cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 12 May 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 6 September 2012 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221.
3. The applicant was granted a Subclass 820 visa on 15 August 2013.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 (1) because the delegate determined that the evidence and information was not sufficient to demonstrate that at the time of decision the couple were in a genuine and continuing spousal relationship or that the applicant and sponsor have a mutual commitment to a shared life together to the exclusion of all others.
5. The applicant seeks review of the delegate's decision and for the purposes of the review, provided a copy of the delegate's decision to the Tribunal.
6. The applicant appeared before the Tribunal on 27 March 2018 to give evidence and present arguments. The Tribunal invited Mr Cerda (the sponsor) to attend the hearing to give evidence. He did not attend and the applicant told the Tribunal that he was 'fed up' with the visa process and consequently did not want to participate in the hearing.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the parties are in a spousal relationship as defined by s.5F of the Act.

Whether the parties are in a spouse or de facto relationship

9. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is a permanent resident of Australia and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all

others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F (2) (a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A (3), which is extracted in the attachment to this decision.

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties married at Box Hill, Victoria, on 18 April 2012. A copy of a marriage certificate dated 18 April 2012 was provided to the Department and the Tribunal accepts this document as genuine. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F (2) (a).

Are the other requirements for a spousal relationship met?

12. Background

13. The applicant claimed that she met Mr Cerda in August 2011 at Flinders Street Station, when she was returning home from College. They travelled together on the same train and exchanged telephone numbers at the end of the journey. Thereafter they spoke by telephone and then met two to three times in a shopping centre. Within two months of meeting they were very good friends. Their relationship developed into a romantic one and they became engaged to be married on 1 January 2012. The couple married on 18 April 2012.

14. The financial aspects of the relationship

15. Ms Kaur provided no documentation to the Tribunal following the lodgement of her review applicant. At the conclusion of the hearing the Tribunal gave Ms Kaur until 6 April 2018 to provide the Tribunal with any documentation regarding the couple's financial circumstances. Ms Kaur subsequently provided the Tribunal with a number of receipts for rental payments in late 2017 and early 2018.
16. Ms Kaur told the Tribunal that since December 2016 she has been employed as a manager in two Indian restaurants, situated in Melbourne and Bairnsdale, Victoria. She works primarily in the Bairnsdale restaurant for approximately 20 hours per week. She said that Mr Cerda is not employed on a regular basis and obtains casual work for approximately 8 to 10 days per month. The couple are renting a unit in Melbourne, which they share with another person. They each own a motor vehicle and jointly own a modest collection of household items. The Tribunal notes that rental receipts provided to the Tribunal were for a unit rented in the sole name of the applicant but which the applicant claims she shares with Mr Cerda.
17. Ms Kaur told the Tribunal that she buys the bulk of food for the couple, whilst Mr Cerda buys meat and some items for himself whilst she is away in Bairnsdale working each week. Mr Cerda gives her money to contribute towards utilities bills, rent and food, when he is working.
18. The Tribunal accepts that Ms Kaur has a superannuation policy for which Mr Cerda is her nominated beneficiary, in circumstances where she dies.
19. The Tribunal finds some evidence that the couple have pooled their financial resources, but not in relation to major financial commitments. The Tribunal finds no evidence of joint

ownership of real estate or other major assets or any joint liabilities. The Tribunal also finds no evidence that either party owes any legal obligation in respect of the other.

20. The Tribunal attaches little weight to the financial aspects of the relationship.

21. *The nature of the household*

22. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.
23. The couple do not have any children together. Ms Kaur said that Mr Cerda has a child from a previous relationship. She was not aware of this child 'existence until approximately two years ago. She has not met this child and unaware whether Mr Cerda visits the child. She suspects he may do so when she is working in Bairnsdale. Accordingly the Tribunal finds no evidence of any joint responsibility for the care and support of children.
24. Ms Kaur told the Tribunal that she is primarily responsible for cooking and household tasks within the home. When she is away, Mr Cerda cooks his own meals and cares for himself. Housework is shared by Ms Kaur and the other persons sharing the unit they live in. Mr Kaur occasionally helps her with cooking and housework.
25. The Tribunal attaches some weight to the household factors.

26. *The social aspects of the relationship*

27. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.

28. Ms Kaur told the Tribunal that she and Mr Cerda seldom spend money on social activities such as dinner in a restaurant. He spent most of his time watching television or going out on his own. The couple have friends, a couple in Melbourne, who they occasionally visit together. Ms Kaur told the Tribunal that they don't socialise much outside of the house because of her work commitments and their limited finances. The Tribunal was provided with no further evidence of the current social aspects of the couple's relationship and the opinion of friends and acquaintances about the nature of the relationship. Accordingly the Tribunal attaches limited weight to the social aspects of the relationship.

29. *The nature of the persons' commitment to each other*

30. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see the relationship as a long term one are all aspects to be considered in determining the nature of the person's commitment to each other.
31. Ms Kaur told the Tribunal that she and Mr Cerda were currently experiencing relationship difficulties and that as a consequence he was not prepared to attend the hearing or speak to the Tribunal. She said that the deterioration in their relationship had commenced after her father's death in June 2015 but had been worse since she commenced her employment in Bairnsdale. Ms Kaur told the Tribunal that Mr Cerda found it difficult to understand her commitment to her mother and brother who were living in India. In February 2018 Ms Kaur travelled to India to visit her family for a month and since her father's death had sent her family money on approximately 10 to 15 occasions. The amounts involved were between

\$150.00 and \$200.00 each time. The Tribunal notes that Mr Cerda did not accompany Ms Kaur on her trip to India this year. Ms Kaur said that she and Mr Cerda were still living together under one roof but their relationship wasn't as settled and happy as it had been in the past.

32. The Tribunal notes that that Mr Cerda provided a statutory declaration dated 15 September 2014 to the Department about his commitment to his relationship with Ms Kaur. However, the Tribunal notes that he did not inform Ms Kaur about his child from a previous relationship until recently and did not accompany her on a visit to her family in India in 2018. Further, without any current evidence from Mr Cerda about his relationship with Ms Kaur and the fact of his absence from the hearing, the Tribunal is not satisfied that at the time of this decision, the parties demonstrate a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is not satisfied that the parties are living together and not separately and apart on a permanent basis, or that the relationship between them is genuine and continuing. The Tribunal is not satisfied that the parties are in a spousal relationship.
33. Given these findings the Tribunal is not satisfied that the requirements of s.5F (2) are met at the time of this decision. Therefore the applicant does not meet cl.801.221 (2) (c).
34. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
35. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

36. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Amanda Mendes Da Costa
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).